UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE GOOGLE ADVERTISING
ANTITRUST LITIGATION

21 MDL 3010 (PKC)
Conference

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New York, N.Y.
April 19, 2022
3:20 p.m.

Before:

HON. P. KEVIN CASTEL

District Judge

APPEARANCES

JASON ALLEN ZWEIG
Attorney for State Plaintiffs

LANIER LAW FIRM
Attorney for State Plaintiffs
ZEKE DeROSE III

GIRARD SHARP LLP
Attorneys for Plaintiff Advertisers
JORDAN ELIAS

AHDOOT & WOLFSON PC
Attorneys for Plaintiff Advertisers
BRADLEY K. KING

ZWERLING SCHACHTER & ZWERLING LLP
Attorneys for SPX/Skinny School Plaintiffs
FRED TAYLOR ISQUITH

KELLOG HANSEN TODD FIGEL & FREDERICK PLLC
Attorneys for Associated Newspapers
ERIC J. MAIER
JOHN THORNE
SARAH MARGOLIS

APPEARANCES CONTINUED:

HERMAN JONES LLP
Attorneys for Direct Action Newpaper Plaintiffs
SERINA MARIE VASH

BOIES SCHILLER & FLEXNER
Attorneys for Publisher Plaintiffs
DAVID BOIES

BERGER MONTAGUE PC
Attorneys for Publisher Plaintiffs
CAITLIN GOLDWATER COSLETT

KOREIN TILLERY LLC
Attorneys for Publisher Plaintiffs
GEORGE A. ZELES
CRAVATH SWAINE & MOORE LLP
Attorneys for Defendant Meta
KEVIN J. ORSINI

FRESHFIELDS BRUCKHAUS DERINGER US LLP
Attorneys for Defendant Google LLC
ERIC MAHR
ROBERT JOHN McCALLUM

(In open court; case called)

THE COURT: This is In Re Google Digital Antitrust Litigation 21 MD 3010. First of all, if you are fully vaccinated and three feet or more from the person next to you, you may take your face mask off or you may leave it on, as you wish.

I will just do the roll call. I have Mr. Zweig.

MR. ZWEIG: Right here.

THE COURT: Mr. DeRose.

MR. DeROSE: Right here, your Honor.

THE COURT: And Jordan Elias for the Plaintiff Advertisers?

MR. ELIAS: In the box.

THE COURT: Thank you.

Bradley King for the Plaintiff Advertisers.

MR. KING: Also in the box.

THE COURT: Thank you.

Mr. Isquith, where are you?

(Raises his hand)

THE COURT: Mr. Maier for Associated Newspapers.

(Indicating)

THE COURT: Mr. Isquith is representing SPX/Skinny School.

Mr. Thorne for Associated Newspapers.

MR. THORNE: Your Honor.

THE COURT: Ms. Margolis also for Associated Newspapers.

(Indicating)

THE COURT: Ms. Vash, where are you?

MR. VASH: Right here.

THE COURT: For the Direct Action Newspaper Plaintiffs.

Mr. Boies, I see in the front row for the Publisher Plaintiffs.

Ms. Coslett. Thank you.

Mr. Zeles for Publisher Plaintiffs.

(Indicating)

Mr. Orsini for defendant Meta Defendant.

THE COURT: And Mr. Mahr for Google.

MR. MAHR: Right here.

THE COURT: Where is Mr. Mahr?

So let me get something straight here from the outset which should not be controversial. Have the two million documents that were produced in the state investigations and were ordered produced in the Northern District of California been produced to the plaintiffs in the civil cases that are part of this MDL on the basis of the interim protective order, all of them?

THE COURT: I'm going to ask Google first and then when you hear his answer, then raise your hand and maybe you

can contribute something.

Go ahead.

MR. MAHR: Yes, your Honor.

THE COURT: Yes, sir.

MR. MAIER: I would just say we are still working to make sure we have all of the documents. Right now we have -- are showing about a 20,000 to 21,000 document deficit. We are working to figure out what those documents are, and then we will reach out to Google.

THE COURT: Let's just have good habits here. Please state your name every time you talk for the benefit of our court reporter.

MR. MAIER: Eric Maier for plaintiff Associated.

THE COURT: Thank you. So that at least is behind us.

I have to tell you this protective order is the worst kind of overkill I've ever seen, and folks do business every day of the week, and I realize this is not an everyday-of-the-week case, but with serious confidential information in MDLs with orders that are more clear that reduce the likelihood of more disputes. So this is just a hot mess as far as I'm concerned.

I look on page 8, and I see references to the Texas OAG order and the multistate confidentiality agreement and a protective order in *Texas v. Google* and how they all relate to this order. I don't know that I have any of those documents.

I know that there is a view by Google that the state plaintiffs should be bound by some of those documents, some of those orders rather than by this protective order, right? Isn't that Google's position?

MR. MAHR: No, your Honor. We think that all the parties to this case should be bound by the protective order you're going to enter in this case.

THE COURT: Including the state plaintiffs.

MR. MAHR: Including the state plaintiffs.

THE COURT: And the state plaintiffs agree with that?

MR. MAHR: They'd have to speak for themselves. I do think, your Honor, that our third parties, however, whose materials were produced under those previous protective orders who are not a party to this case and who we therefore think those protections should remain in place for.

MR. ZWEIG: Your Honor, the state plaintiffs do agree with that. The only exception to that is how to treat the investigation materials that were produced in our investigation of Google.

THE COURT: All right. Now tell me about what they are.

MR. ZWEIG: So that's the 2 million documents that your Honor just referenced. We believe that when --

THE COURT: Well, that's a pretty big carveout. So those two million documents, which I thought is the bulk of

what we're talking about today, you don't believe should be under the proposed protective order that's being submitted in this case but should remain under the prior protective order, is that your position?

MR. ZWEIG: No, your Honor. We think the investigation materials were essentially produced in this litigation and are now essentially part of this MDL and should be governed by the order that we're talking about today and that we have the disputes on.

I think that's -- I'm sorry, your Honor. That's Google's position that the investigation materials should be treated under the prior order only as to the state plaintiffs, so they seem to want to have two different regimes.

THE COURT: Is that accurate?

MR. MAHR: No, your Honor. For example, with respect to clawbacks, we agree that whatever procedure the Court decides on for clawbacks in this case should apply to all those documents as well. There is a dispute between the parties as to whether -- and it's a bit of a technical question, but whether those 2,200,000 documents should be viewed as deemed produced in this case. Our concern there is that the plaintiffs will use that as a back door to then ask for a privilege log that they didn't pursue during the investigation and will try to do that now. That's what they suggested in a meet-and-confer.

THE COURT: I have to tell you. I think that's what you're trying to do in this document, is resolve a lot of issues down the road that don't go to the question of protection of confidential information in this document.

All right. Let's start with an easy one. Let's go to page 2, paragraph 1(b). It sounds so reasonable when you read it. "Confidential information or confidential means information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c)."

How reasonable does that sound? Okay. So tell me what the standard is under 26(c), Mr. Mahr.

MR. MAHR: The standard under 26(c) addresses documents that could humiliate, embarrass, or otherwise -- I don't have it in front of me -- harm the interests of the producing party.

THE COURT: Well, let's see if that's quite what it says. So, it sets forth a regime where a party may seek protection for certain documents. So it tells you where you may move for a protective order, and you may move for an order forbidding the disclosure or discovery.

Does that have anything to do with this?

MR. MAHR: With a protective order, no.

THE COURT: Okay, so that's 26(c). The next provision is "specifying the terms including time and place or the

allocation of expenses for the discovery or disclosure." This is now 26(c) which you incorporate.

Does that have anything to do with this?

MR. MAHR: I should first say I don't want to be defending this. This was plaintiff's suggestion to which we agreed, but --

THE COURT: Well, then you're on the hook.

MR. MAHR: Sure. And I think the idea was -- is it in the last line. I don't have 23(c) -- 26(c) in front of me, unfortunately, but there's a list of reasons why --

THE COURT: A through H. Go ahead.

MR. MAHR: Right before A through H, if I'm picturing it correctly, it talks about harassment, embarrassment, and those factors. Those are the things I believe the parties believed would be a basis for identifying something as confidential information.

THE COURT: So confidential information would be information that if disclosed would present annoyance, embarrassment, oppression or undue burden or expense.

So how do I apply that standard: Undue burden or expense? What does that have do with the confidentiality of the document? The document request might be wildly overbroad, and it may cost a king's ransom to produce it, but what does it have to do with confidentiality?

MR. MAHR: It doesn't, your Honor.

THE COURT: So, you know, I pick this up, this isn't even something in dispute. This doesn't give a workable standard of what's confidential.

I think where I'm headed on this is I'm going to issue a confidentiality order in this case because I really think the parties fell down on the job. No one's -- everybody is acting in the utmost good faith. I am not suggesting otherwise. But this is not helpful. This is the stuff that causes fights and disputes and time-wasting and satellite litigations.

Now, we get to, I think, the first substantive dispute is on page 3. "Subject to the foregoing, highly confidential information may include trade secrets, including algorithm and source code." And plaintiff wants to change that to algorithms or source code.

Help me out here. Maybe it's late in the afternoon, but what is the intended meaning of that change, the *and* to an *or*?

MR. ZWEIG: I think it's not as much the *and* or the *or*, your Honor, as it is the defined term source code. Paragraph 1(u) -- proposed 1(u) on page 7 where source code is defined, it's plaintiff's position that the protective order that we've negotiated should govern source code. Source code is a complex area, obviously. I have one of my co-counsel here who just negotiated with Google. It took one and a half years to get a source code provision. We think we should be doing it

now and get it done now while we're waiting on the motion to dismiss. We're not asking they produce source code. We just want to get this issue off the table. So it's more of an issue of the fact that we want to have that defined term source code and have this protective order govern the production of source code, and there's a dispute between the plaintiffs and Google on that.

THE COURT: All right. So now help me out. Somebody help me out here. If I agreed with the party who doesn't want initial cap S and C source code, but wants lower S and C source code, what would I be buying into if I went with the lower case S and C rather than the upper case S and C? What would be the significance of this? Can you explain this to me? Because I tried to spend some time with this, and I wasn't smart enough to be able to figure it out. Go ahead.

MR. MAHR: Your Honor, Eric Mahr for Google. I apologize for the confusion. I believe that the upper case S and C imports into this protective order, and I think this is one of the issues that you're raising, seven or eight pages on the treatment of source code which were introduced into these negotiations in December after we were going forward on them for two months, and there were no source code provisions in the Texas protective order. There were not any in the Northern District of California protective orders in this case, but after two months while we were on the verge of being able to

present the issues that do exist to you in January, they were introduced.

We have tried to meet and confer on them. We have provided three pages of our comments and questions about the proposed source codes, and we haven't got any engagement from the plaintiffs on that. We, therefore, think this issue should be negotiated separately. Source code, you can't overstate how it's the crown jewels, courts have recognized this, of a digital company.

THE COURT: I got it. But let me ask you a question. Google - I'm just taking a wild guess - has been involved in a fair amount of litigation over its lifetime. Are you telling me that you've never entered into a confidentiality order that's covered source code?

MR. MAHR: We have entered into those agreements, but those agreements specifically addressed source code, typically taking as the basis for them the model provided by the Northern District of California on source code. Plaintiffs said that they used that as inspiration, but they apparently didn't find it very inspiring because they have a number of really significant departures from that model, and when we've asked them about it in the three pages of questions that we appended to our letter to you, they haven't engaged on it. They just said, we're at an impasse. Let's see what happens when we go to the Judge.

MR. ZWEIG: Well, your Honor, you may not be surprised to hear we don't agree with the presentation of the chronology that Mr. Mahr presented. We provided the first draft of a protective order to Google on October -- and I still call it Facebook.

THE COURT: Got it.

MR. ZWEIG: Google and Facebook on October 15. We used as a model the protective order that Judge Jordan entered in the Eastern District of Texas that defined *highly confidential information* as it is here when it had the lower case source code. Google then in their revisions carved that out and said we'll negotiate source code at a later date. That was in mid-November. We then said, well, why are they doing that? It takes a long time to --

THE COURT: Let's get to the end of the story now. There's a Northern District of California model source code protection, okay. It's reported that you found your inspiration from that. You could admit or deny, but assuming you did, what's the problem? Google has entered into a number of protective orders governing source code.

Mr. Mahr, I assume you're not unwilling to produce three exemplars of protective orders for source code that Google has signed onto?

MR. MAHR: We certainly can do that, your Honor.

THE COURT: Okay. Let's get that. See whether you

can live with it.

MR. ZWEIG: That's fine with us, your Honor. We just wanted to negotiate the source code protocol, that's it, and we have been on -- they still get to respond.

THE COURT: You've got to be creative. If you have an obstacle like that, why not say to the other guy exactly as I've said, let me see what you've done in another court.

MR. ZWEIG: I'm sorry. Just so it's clear, your Honor, we when we provided them with our first draft of source code provisions, yes, the Northern District of California one was used, but we also used two other ones that Google had signed onto in other cases, so it was an amalgam of all three documents, but that wasn't sufficient for Google.

THE COURT: Well, you know what? To some extent the perfect is going to be the enemy of the good here, and so presumably Google would be in an awkward spot before me if you looked at the three of them and so there's A, B and C. A said, well, as plaintiff's lawyer, I like B the best. A and C may be okay, but I like B the best. We agree to B. And Google says no. That's a tough spot for them to be in if they agreed to it in another case. Why does everybody have to reinvent wheels here?

Mr. Boies, you wanted to make a comment.

MR. BOIES: No, I think the Court actually just said what I was going to say. I think that the right way to proceed

is for them to give us protective orders that they've entered into in the past, and we can give them a choice and see if they accept it.

THE COURT: Okay. And this order is going to have to have a very clear designation of what is confidential information.

MR. BOIES: Yes.

THE COURT: That's for sure.

MR. MAIER: Your Honor?

THE COURT: Yes.

MR. MAIER: Eric Maier for Associated Newspapers. I just want to be clear about one thing. We sort of are in the position that you just laid out where Google is objecting to a source code protocol that they entered into just 12 days ago, actually, in another antitrust MDL where Google is the defendant. Google agreed to accept 12 of the 16, three-quarters of the 16 things, that they objected to in the letter to your Honor, and that was just a day after they responded to -- or submitted their letter in this case.

THE COURT: I choose to be an optimist, and I think maybe they're going to rethink it, okay?

Okay, I'll bite. On page 5(k), what are we trying to capture there? I understand what "governed by the terms of this order" means. I do understand that, and I would have thought that I understood "deemed to have been produced in

these actions." What are you all disputing and fighting about there?

MR. ZWEIG: Want me to go first, your Honor?

And I apologize to the court reporter. I forgot to announce my name at the beginning. Jason Zweig.

I think that goes back to the first issue your Honor raised about how to deal with the investigation materials. I think we all agree that this confidentiality order once entered will govern the parties, all parties going forward, but what do we do about the materials that were produced in our investigation. And I think that implicates two issues: How do you treat clawbacks of the investigation materials and privilege logs. That's really the two issues.

Google has said that they did not believe that these documents were produced in this MDL; that those are -- at least as to the state plaintiffs, those are materials that were produced in a state investigation, and so issues such as like clawbacks, for example, Mr. Mahr said that this order should govern clawbacks for even the investigation materials. That's the first time we've heard that. Because in meet-and-confers they've taken the position that, at least as to the state plaintiffs, clawbacks need to be litigated in all the different state courts for all of the different state plaintiffs, and we said that's ridiculous. Judge Castel has this MDL, you know, to the extent we have an issue on those, we can talk to the

Judge about that.

THE COURT: Are you talking about privileged clawbacks?

MR. ZWEIG: Yes.

THE COURT: All right. What I don't understand, and I don't know, maybe this is Google's position, but is there any dispute -- put the state plaintiffs aside. Take the publisher class, the advertising class, the individual actions. Is there any dispute that the two million documents that have now been produced, albeit under an interim confidentiality order, were produced in this action?

MR. MAHR: Well, we don't have an objection to the plain meanings of the word. I think Mr. Zweig just suggested--

THE COURT: No. No. Answer my question.

MR. MAHR: No, there isn't.

THE COURT: So they were produced in this action.

MR. MAHR: They were provided in this action. I think -- they were not produced to the extent they were produced to discovery requests that were tailored to the needs of this case and tailored to the relevant actions subject to the action.

THE COURT: That may be true, but they were produced in this action as an order of this Court, not in any of the standalone state actions.

MR. MAHR: Yes. Yes, your Honor.

THE COURT: So those documents are intended to be governed vis-a-vis, let's say, Mr. Boies' client, under this protective order. Right?

MR. MAHR: Correct. And if we have a clawback request, we'll do it under this protective order under the procedure you --

THE COURT: But, however, if the state plaintiffs -- as to the state plaintiffs, your position is they're not.

MR. MAHR: No. Same clawback provisions regardless whether -- who it is from. We'll be clawing the document back from everyone, and, therefore, it should be it same procedure for clawing it back. We wouldn't just claw it back from one party and not another.

THE COURT: Again, maybe my lawyering skills are fading, but I'm not gathering the distinction between "governed by the terms of this order" or "deemed to have been produced in these actions" which would have the effect of it being governed by this order. So what am I missing here?

Maybe Mr. Boies can explain this to me.

MR. BOIES: I think your Honor is exactly correct; that if it's deemed to have been produced in these actions, it will by definition be governed by the terms of this order.

Now, what I think maybe is not being performed as correctly as it might as to why Google cares about this, what Googling thinks is that if these documents are not produced in

this action, that they somehow -- we just got them out of Texas without a court order, without them being produced in this action, then they don't have to respond to, for example, a request for a privilege log for alleged privileged documents that they withheld. This is to some extent, I think, another issue of trying to solve problems down the road in the protective order.

THE COURT: Well, I have a little bit of sympathy if that's what Google is saying, there may be another way to deal with this from the standpoint of a -- forget the state plaintiffs for a moment. State plaintiffs got these through a lawful means in the state investigation and the state action. That's done. But I don't think it's appropriate for the private plaintiffs to turn around and say, well, go back and look at what caused you to produce this to the state in the state investigative phase and tell me what you didn't produce to them because it was privileged.

I'll tell you what would be fair, is if you want to frame a proper Rule 34 request and the Rule 34 request sweeps in documents as to which the attorney/client privilege applies, then that's a different story, and it may very well be fair and appropriate that Google produce a log. All right?

I imagine, I don't know, people can be very creative with their Rule 34 requests, but I'm going to take a wild guess that a very high percentage of the documents that a reasonable

Rule 34 request would reach, Google is going to say it's already in the documents you have. But there are some documents that are responsive to this Rule 34 request which you crafted in 2022 that Google is going to say, no, we don't plan to give you that. We haven't given it to you as part of the two million, and we don't plan to because they're privileged, and in that instance, the rules of the road are you produce a privilege log.

And I see counsel for Google pretty much nodding in agreement.

MR. MAHR: Yes, your Honor. If I may, Eric Mahr for Google. You put your finger on it, and I'm sorry it wasn't clear on the face of it. "Deemed produce in this action" seems like innocent words, but through the meet and confer it was made clear that that was viewed as a way to get a privilege log looking backwards. We're happy to do Rule 34 discovery when your Honor lifts the stay, and at that point if there's a privilege log required, then we would comply with order at that point, but not going back to two years in the state court investigation.

THE COURT: Yeah. And actually this is not even really an issue that affects the state. I don't know. I guess the state could still issue a Rule 34 demand and trigger the obligation.

MR. ZWEIG: Yeah, your Honor. If I may, the

discussion you just had with Mr. Boies I think was qualified as to the private plaintiffs.

THE COURT: I know. And I want to hear about it.

MR. ZWEIG: So, in fact, in Judge Jordan's court while discovery was ongoing before the MDL, we did issue Rule 34 requests requesting that they produce the documents that they produced in the investigation in this case. They objected to those requests. I am pleased that this has already been productive because it sounds like we've eliminated an issue as to clawbacks. Those will be governed by, as Mr. Mahr clearly said, this Court. We do still have though the outstanding issue of privilege logs. Google had promised us privilege logs with respect to the documents that they produced, and we're meeting and conferring with them now on it.

THE COURT: Everybody is going to have to accept my advance apology for interrupting, but I'm going to try to keep this all moving, that's why I interrupt.

MR. ZWEIG: I understand.

THE COURT: But if your Rule 34 requests describe categories of documents, that's one thing. If it's one Rule 34 request that says, "Pursuant to Rule 34, give me everything you gave in the civil investigative stage," that's not going to work with me. That's not going to trigger an obligation to produce a privilege log.

So as far as I'm concerned, what I said about

Mr. Boies can apply to you as well. I wanted to test it first with the private plaintiff, but that can also work for you. So it seems to me that this gets resolved with "governed by the terms of this order." And I'm telling you, we have a transcript of this. My intent here is, I think you're going to wind up getting approximately to the same place, but conceptually it's not "Give me a privilege log for anything the states ask for that you didn't produce." No. It's going to be, you serve a Rule 34 request. The defendant comes back and says, "I've produced everything that's non-privileged that falls within that request," and that triggers their obligation with regard to a log.

Now, we've all had experience with logs. Sometimes common sense prevails, and you spare your judge, and you say, "Well, no, I'm not going to make you log things since the institution of this action your memo to files last week because I don't want to have to do that when you serve a document request." There will be a ton of those things where common sense will prevail. And if they don't, then we're going to have a very unhappy afternoon together, but, you know, so that seems like it's governed by the terms of this order.

As to the source code, we're going to get a source code provision in here.

Now, I don't know what paragraph three means. I mean, I really have to stay up late at night working on this one.

"Except as explicitly provided herein," and it seems like a lot is explicitly provided herein. "Nothing this order purports to alter the protections previously afforded to investigative materials, including under the Texas OAG order and the multistate confidentiality agreement," which, as I pointed out at the outset, I don't have. I don't even know what this would mean if it were included.

Why do you need this?

MR. MAHR: Eric Mahr for Google. Your Honor, we put this in -- the first and easiest reason is that there are third parties out there who produced documents under those, and that those protections should remain in place for those third parties who aren't a party to this.

THE COURT: Let's pause on that, on your "first of all." Let's pause on that. They wouldn't be in the two million documents though.

MR. MAHR: Correct.

THE COURT: Right?

MR. MAHR: That's correct. They are in the definition of investigation materials though.

THE COURT: All right. I'm almost wondering - and maybe I'm agreeing with you - why is this even being discussed in here? They haven't been produced in this action. If no reference was made to them, this wouldn't even come up. How does it come up?

MR. MAHR: I think it's addressed by your previous resolution of the whole "deemed to be produced" issue.

THE COURT: All right.

MR. ZWEIG: Your Honor?

THE COURT: Yes.

MR. ZWEIG: Sorry to interrupt, but if we're going to move on, this issue also implicates on page 1, there's some language in footnote 1 that I think relates to this.

THE COURT: Right.

MR. ZWEIG: We had language that basically says this confidentiality order would supersede the two orders, the Texas order and the agreement which, by the way, your Honor, for your information, is attached as exhibits to our April 6 letter at document 274.

THE COURT: I must have missed that.

MR. ZWEIG: No worries. So we just wanted to make clear again sort of going back to the issue we've been discussing, this order supersedes those as to the state plaintiffs.

THE COURT: But the problem I have is these are third parties who produced documents to the state, right? I assume. That's what we're talking about: Third parties who you legitimately asked for documents from, correct? No?

MR. ZWEIG: Correct. Yes, sir.

THE COURT: And you entered into some sort of a

confidentiality agreement with them, right? I don't know whether it was so ordered by a judge or it's under the authority of the attorney general to do that, but all of that is fine. But whatever you got, you didn't get in this lawsuit, and I'm not in a position to modify the protections that relate to these third parties. I don't know whether they like those protections better than they like this order, or less well. I suspect they like the existing protections better. I don't know.

MR. ZWEIG: I understand.

THE COURT: But it's not something that I should be addressing in here in the absence of these third parties.

MR. ZWEIG: Your Honor, paragraph three does extend whatever protections were designated by the third party. Obviously, Google's documents are also part of the investigation materials, but they're here to speak for themselves. Paragraph three does extend whatever confidentiality designations the third party made, but your Honor's point about whether the third party would want to be bound by this, I understand.

MR. BOIES: The only thing I would ask to be sure we're clarifying is this is relating to third parties. The language here is not limited to third parties. It would be inclusive of anybody, including Google.

THE COURT: Well, that should be -- that should be

modified.

MR. BOIES: Yes.

THE COURT: That should be modified. It should be if a third party produced it, then it's not produced in -- if it produced it to the state AGs before litigation was commenced, they didn't produce it in this action.

MR. ZWEIG: Your Honor, I'm sorry to interrupt again, but my co-counsel, Mr. DeRose, reminded me that in the Eastern District of Texas as to those third-party materials, they were essentially by virtue of Judge Jordan's order brought into and covered by that order, which this order would extend to by virtue of paragraph three.

Am I saying that right, Mr. DeRose?

MR. DeROSE: Zeke DeRose for the states. When Judge Jordan's protective order was entered, the third parties had an opportunity to r designate the confidentiality provisions, and that was done so within 60 days of that order being returned.

THE COURT: Now, listen, there are a lot of moving parts. I'm not faulting anybody, but now I'm learning something new. The claim is made that the third-party documents were produced in an action which is a constituent member of this MDL.

MR. DeROSE: I think that's correct. Eric Mahr I think was involved in that. Is that how you recall?

MR. MAHR: They were produced to us as part of the

state's production of the investigative record in the case.

MR. DeROSE: My understanding is that the third-party documents were governed by Judge Jordan's protective order. I think what the states were hoping to do is reduce ambiguity and say there's going to be one protective order that governs any complaints if there's a violation, and that's going to be Judge Castel's protective order.

THE COURT: Yes. Go ahead.

MR. MAHR: Eric Mahr for Google. I sense you're not going to give us another shot at this. If you did, we could try to clarify this because there's another issue, for example, the multistate confidentiality agreement. Now all the states to whom Google produced the materials under the multistate confidentiality agreement subsequently agreed to participate in the lawsuit, so we want the protections of that agreement to stay in place as to those other states.

THE COURT: Who disagrees with that? Anybody?

MR. ZWEIG: No, your Honor. In fact, that's dealt with in footnote 1. Anyone who is not a party is still bound by those.

THE COURT: So you have that, Mr. Mahr.

Now, doesn't mean that somebody can't make a new Rule 34 demand or get documents. It doesn't insulate anything. It's just not part of the MDL. That's governed by whatever that preexisting agreement is. But if documents are

legitimately produced in a constituent case in an MDL, for example, before it arrived here, then those documents should be governed by this order and can be legitimately governed by this order.

What is an overlay file?

MR. ZWEIG: I can give you my best explanation, your Honor. It is a file that is produced when a document production is made, and, for example, if there's a clawback, the party clawing back the material would produce a new file that the receiving party can put into their databases, and it would essentially include all of the meta data, revised meta data, revised documents that are being produced pursuant to the clawback request, sort of to displace those documents that have been clawed back.

That's my best understanding, but maybe there's a technical wizard that can do better.

THE COURT: This all relates to what if anybody wakes up and discovers that a document they produced was privileged? Is that under that umbrella heading?

MR. ZWEIG: I think privileged or I think it could apply if they change the confidentiality designation and need to reproduce the documents as another scenario. It deals with the reproduction of documents, which could encompass at least both of those scenarios.

THE COURT: Now let me hear from Meta on page 14.

MR. ORSINI: Yes, your Honor. Thank you. Kevin Orsini for Meta.

Our position on this, I think, your Honor, is fairly straightforward. There are a lot of constituent actions that if put into this MDL, how exactly those all shake out once the court rules on the motion to dismiss to the Texas complaint remains to be seen, but at least as we stand here right now, there are a number of cases that have absolutely nothing to do with my client. They don't include allegations related to the GNBA or anything else concerning Meta. And our basic view, your Honor, is just because they're part of an MDL doesn't mean though ought to get discovery. That wouldn't on its face satisfy the basic rule that you only get discovery in your action of documents that are reasonably likely to lead to relevant and admissible material.

THE COURT: This is a situation where I'm quite sure we're getting ahead of ourselves because certainly reading the submissions on lead plaintiff, or what do we call it, lead counsel for the advertiser class, one of the, I guess the successful designee said, look, I filed one of the first class actions here, and at that moment in time I did not know about the agreement with Facebook and did not include that in my allegations because the would-be lead counsel said, oh, pick me, Judge, because I have that in my complaint. And the folks who filed the first action who had been designated by Judge

Freeman said, well, Judge, don't really hold that too much against us, because as soon as the stay is lifted and we get a ruling on the motion to dismiss, if that survives, we sure as heck plan to include that. So this is going to be -- I know you just used that as an example, but this is going to be a largely academic point.

MR. ORSINI: It may or may not, your Honor. Again, Kevin Orsini for Meta. We have a pending motion before the JPML to bring another action into the MDL.

THE COURT: I saw it.

MR. ORSINI: Which if it comes will have allegations that have nothing to do with any of the other claims. I guess, your Honor, what I would say is, I don't know what I don't know with respect to how these cases are going to shake out, so I take the Court's point on that. We're perfectly happy to table this issue. We just want it to be clear that nothing in this order automatically would override the notion that if there are constituent actions that have nothing to do with Meta and therefore shouldn't be getting access to our discovery material, that we can take that issue up later and make sure they don't get access.

THE COURT: That's fine. If the plaintiffs make the call and a rational plaintiff may make the call not to get into this arena, then it seems to me that you have a point there, and there should be a way that we can accommodate that.

MR. ORSINI: I think that makes a lot of sense, your Honor.

THE COURT: Okay. I'm not even going to -- I'm going to table the -- well, let's find out here. I know that there is a sad tale of woe. I've read the sad tale of woe, and I don't mean to belittle it in any way, shape or form. There were apparent leaks, and so I understand why Google is paranoid about this, but why isn't this a matter -- this is pages 16 and 17 regarding forensic investigations and forensic investigators. Why isn't this a down-the-road issue where, you know, there's no telling what I might -- I might get the U.S. Attorney's Office involved. So why get into this now? Why isn't this a down-the-road? And I'll say it, if there are leaks, I reserve the right to order forensic investigations of computers, lawyers' computers. All right? Doing it in a responsible fashion that preserves the privilege but gets to the bottom of where the leaks are.

So, you know, anybody reading this transcript should understand that this is not a license to abuse the protective order. It's just that carving out that future circumstance I don't think is needed in this order. If I'm dealing with a real situation, I probably will be more inclined to be more expansive in what I'm going to allow than I might if I'm dealing with an abstraction. So that's tabled

MR. MAHR: Eric Mahr for Google. May I respond to one

thing?

THE COURT: Yes.

MR. MAHR: Given your statement, I don't think we need the two paragraphs that you just referred to. The relevant issue is though in the acknowledgment at the end with respect to those who get access to highly confidential or confidential information, and to make sure on the theory that all of those won't read the transcript to this hearing --

THE COURT: Send them a copy of the transcript. Let's not lard up the protective order.

MR. MAHR: This is just the acknowledgment. It won't be the protective order.

THE COURT: I understand. I understand. You want it for the *in terrorem* effect.

MR. MAHR: Absolutely.

THE COURT: I fully understand that, but you're getting the *in terrorem* effect from this transcript. So, be my guest. Everybody who signs the protective order gets a copy of the transcript if you'd like or the excerpts from the transcript.

Okay. Page 18, the bottom there, it's not -- is it *either/or* or is it *either and*? Is it the Google proposal, or is the plaintiff's proposal the Google proposal but substituting this additional language?

MR. ZWEIG: I think it's an *or*, your Honor.

THE COURT: It's an *or*?

MR. ZWEIG: It's an á la carte; pick one or the other.

MR. MAHR: Eric Mahr for Google. We agree that it's an either/or, and that's because the plaintiff's provision adds something that's not in the federal rules. Our provision is based on the basic idea that if a document is clawed back, you destroy it or you return it, and then it's logged, and you can challenge it.

We also added in there from the case law that if there's information in your head from having read that document, you don't have to -- it's impossible to --

THE COURT: Where do you find it in the federal rules? Let's see whether we can get this as close as possible to the federal rules.

MR. MAHR: Well, it is in 26(b)(5), and the word we left out was *sequester*. And the reason we left out the word sequester is because during the meet-and-confer the plaintiffs told us they had what we believe is a creative and incorrect definition of sequester, a definition that would allow them, when we identify a document to be clawed back, to take that document, to utilize it by sharing it with the other members of the joint plaintiffs group so that they could come to a consensus as to whether as a group they should challenge the clawback or not. We think that is exactly what should not happen; that instead -- we don't have any objection to the use

of sequester in the way it's been used in common English language or in the federal rules, which means put it away somewhere where nobody will see it.

THE COURT: Put it in a sealed envelope and keep it on the side of your desk, right?

MR. MAHR: A locked cabinet would be better.

THE COURT: Yeah.

MR. MAHR: But they told us that in order to get consensus among a group of many stakeholders that they would have to circulate the document in order to get input. This could be a document, for example, say we make a production on a Monday, and on Wednesday we realize there are ten privilege documents in it. We tell them, "There are ten privilege documents in there. Send them back."

THE COURT: You know what? I think you ought to rewrite it, use the word sequester and define it. And no one is going to get hurt because if it's sequestered, and there's a big fight about it, the document is going to come to me, and I'm going to open the envelope, and I'm going to look at it.

MR. MAHR: Yes, your Honor. We just want to ensure that it doesn't -- having been identified as a clawback to mean it's then going to be circulated among 30 law firms.

THE COURT: I understand. It's the lawyer -- well, you have to figure out what are you going to write into this as to the protocol. You've got to write in somebody. It's going

to be the third-year associate who happens to have it on their desk or a paralegal, and they're the sequestering party? It's got to be a little more flexible than that.

MR. MAHR: We're happy for the plaintiffs to identify one person or firm to do that but not 40.

THE COURT: Yeah, I think that makes sense. You identify -- this would transcend the various groups, so maybe one designated lawyer by the state plaintiffs, the publisher class action, the advertiser class actions, and collectively individual actions have to pick a person, something like that, and they can have access, but it doesn't get circulated generally because somebody other than a paralegal or a second-year associate has to be able to frame the arguments.

MR. MAHR: Understood, but I believe that the plaintiffs also put the word utilize the document for purposes of challenging the privileged designation, and I don't think that's contemplated by the rules. That normally happens if you identify it. It hasn't been read by anyone; we've identified it.

THE COURT: Listen, I've agreed with you on the sequester point. So it's going to be sequestered, meaning that they're not going to quote it verbatim or attach it to their position. They will say we honored the sequester. We have it, but we believe it was sent beyond a reasonable group of addressees and to third parties. It was sent to third parties

and any privilege that may have existed is gone.

MR. MAHR: If I may, if they create a clean team like the government does to do that so those people aren't involved.

THE COURT: No, we aren't doing that.

MR. MAHR: Then the case is by identifying ten privilege documents in a production that they might not even have seen yet, they're now going to pool those. Instead of just sending them back to us or destroying them, they're now going to read them all and say, "Oh, yeah, we agree, this is a privileged document."

THE COURT: Listen, I started where I think I'm going to end, which is, get as close as you can to the language in Rule 26 because then when you fight about what that means, we can look at what other judges have said it means. And I'm allowing a bit of an exception for defining the word sequester.

MR. MAHR: Understood.

THE COURT: But the reality is, it's never good when you have to clawback. It's suboptimal. You don't want to have to do that. I know you don't. And that's legitimate, but there has been some milk spilled when that happens. And that's the way it is. Otherwise, you have something else that is unworkable, which is what I described as the lower-level person being the only one who could have a discussion with you or take a position on it. How can that be right?

MR. MAHR: They will still have the virtue of our log

and be able to challenge it as they would challenge any other privileged document on the basis of the log. In other words, they shouldn't -- I think the law in this circuit focuses on the protection of the privilege, and the fact that an inadvertent production, especially in a case as large as this with as many documents going back and forth as this, they shouldn't get a benefit out of our having to claw it back by being able to read a privileged document and then say, oh yeah, you're right, here it is.

THE COURT: Listen, the rule controls, but before the rules, there were debates. There was the one approach that, my goodness, if my adversary says this document is privileged, I shall not look at it. I'm going to seal it right now and put it in the safe. It used to be, you know, bar association panels on it. The other school of thought was, my goodness, I have a fiduciary duty to my client. I don't have the luxury of doing that. Plus, which this system promotes a world of fibbers. Let's me just take a peek. Oh, it's just a little peek, you know. So there were debates about this, and there was not unanimity, and it's wonderful that there is something in the rules on clawback. Let's get it as close as to the rules are and leave it at that.

MR. MAHR: Understood, your Honor. Thank you.

THE COURT: Listen, now we're getting into another big area that's going to surface at some point here. I don't know

what this order is talking about with, you know, "or up to five days before trial, whichever is sooner." I don't know what the order is talking about when it's saying "seal first and then litigate later."

You know, my individual practices only have one requirement on a confidentiality order, and that's the one thing that neither side wants to comply with. We've had bad experiences in this district where a provision was inserted in a confidentiality order that granted the right to file a document as sealed just solely on the decision to stamp it as confidential or highly confidential. And for that reason, my individual practices say -- the first sentence is all I need to get into. "Notwithstanding any other provision, no document may be filed with the clerk under seal without a further order of this Court addressing the specific documents or portion of documents to be sealed." That's to reduce the practice.

If you think you're going to have summary judgment decisions in this case, if we get that far, that are going to have sealed materials and sealed portions of the judge's decision, you're wrong. I think you can look -- I don't think I have ever done that, and I have never once had a trial, and I hope never to have a trial, where there is sealed evidence. I don't even know how that's done. I saw something in here that says, oh, we'll talk about that later. what do you want to do? You want to clear the courtroom during the testimony or the

playing of a deposition? No. We're not doing that. This is a public courtroom. Nor am I going to impose requirements on jurors as to what they can and cannot say when they're discharged as a juror.

Now, fortunately, I've never had to deal with the Coca-Cola formula. And I get it. You know, if you have to have testimony on something about your source code -- first of all, I can't imagine in an antitrust case, yeah, it's in your source code, but you're going to be describing what the source code does, not how you do the source code. You're not going to lay out the formula in the algorithm. You're going to have testimony that describes what the algorithm does, and that -- you know, it's part of the unpleasant consequences of being a party to a lawsuit. And you may have good arguments as to why the discovery should be narrowed, et cetera, but I just don't see this as a case where I'm going to allow you to file any old thing that somebody in somebody's shop designated as highly confidential, file it as a sealed document. Oh, but wait, Judge, we wrote in here that then you have to justify it after the fact. No, don't justify it after the fact. Justify it before the fact.

MR. ZWEIG: Your Honor, if I may?

THE COURT: Yes.

MR. ZWEIG: I think I could speak to this. I should also say I've seen the Coca-Cola formula in the high fructose

corn syrup case. It was interesting.

THE COURT: All right.

MR. ZWEIG: But I think this provision you are speaking about, your Honor, largely came from the plaintiffs. In the investigation materials, the two million documents, nearly every single one was marked, as you might expect, highly confidential. And so we're in a situation where we as plaintiffs under the judge's -- your Honor's individual practices need, I think, to in 14 days in advance notify the defendants about which documents we plan to use.

THE COURT: So you want to modify the 14 days to something less than that or you want some modification? That's fine. But the answer is not that you're going to file the document under seal and then, what? I looked very carefully. What happens? Oh, it stays sealed, I think, until the judge gets around to ruling on the sealing, right? Is that right?

MR. ZWEIG: That is correct, your Honor.

THE COURT: No, I want you to think of what that means. So I have criminal cases. I have civil rights cases. I have commercial cases of all different variety. And nothing can happen, and this remains sealed, until I find time to write an opinion; not just an order, write an opinion under *Lugosch*. Go read *Lugosch* and its progeny to see what kind of a regime we operate under now.

And, by the way, I happen to agree with it. But it's

a time-consuming document-by-document process. Go look at the orders on sealing. And if you think that what I'm going to do is just spend hundreds of chamber hours just figuring out the sealing before we get to the merits of it, it's not happening.

MR. ZWEIG: And I sympathize with the Court. I think the question for us was under your Honor's individual practices, if we're not the ones -- we agree with the Court. We don't want all of this stuff sealed. We'd like to have it in open court, but we're not the ones to make that decision. And so what ends up happening under your Honor's individual practices is the burden, even though it's Google that marks everything highly confidential, including press releases and everything else, we're the ones that have to make the motion to seal. We don't want to make the motion. We don't agree with the designations in the first place.

THE COURT: But I have it in here, and you're allowed to not like my days. I'm not sure I even like my days. But it's "Unless otherwise ordered, a party seeking to file an opposing party's confidential information shall so advise the opposing party 14 days in advance specifying the precise portion of the information the party seeks to use, the general purpose thereof and any redactions to which the party does not object. Within 7 days thereafter, the party whose confidential information is sought to be used may make an application to seal in accordance with the first paragraph of this order,

et cetera, et cetera.

So, in that instance, the monkey will not be on your back except to give them notice, and then they're the ones who have to meet the *Lugosch* standard. And the answer is, you know, there are a lot of documents where you're interested in the first and the third paragraph. That's where you're making your point. But the second paragraph has something that's arguably highly confidential and maybe should be sealed. Well, if you say I really only want the first and the third paragraph, you moot out this thing. And so you file it redacted. I'm a grownup. I can ask for the unredacted version if I need it. That's the goal here is to, you know, cut back on the froufrou.

This is not going to go well as a case if the name of the game is to see whether the Court can be worn down with satellite disputes. There are a lot of tools at a Court's disposal to make sure that doesn't happen. Even with parties who do not give a hoot about monetary sanctions; you don't have a monetary sanction that could have an impact on them. There are a lot of other remedies open to a judge, and I don't want to play that role. I've done very well. This is I think my fourth MDL, you know, and the discovery disputes have been nonexistent. Go look at the docket in the *Bank of America*, the *Sun Edison*, the *Time Warner Cable* litigation. In all of them, you can count the discovery disputes on one hand. I think in

the Bank of America there was one dispute. It was whether Bernanke was going to have to appear for his deposition. So the judge said, I'll tell you what, take the depositions of the first reports and then get back to me if you can't get the information from them, and then we'll decide the issue. Never heard from them again. So, I'm all in favor of parties being vigorous advocates on the merits. Save your energy for the merits, for the stuff that counts. I'm all ears, but not on the collateral nonsense.

MR. BOIES: Your Honor, can I address the sealing issue?

THE COURT: Yes.

MR. BOIES: I understand and agree exactly what the Court has said, but there's a practical issue here, and, that is, that given the volume of materials that are stamped or designated as confidential or highly confidential, what it means is that we have to know 14 days in advance.

THE COURT: So I said I'm flexible on the days. So if 14 days does not work for you, work that out. You can put in language, and if you say, five days, three days, whatever, come up with something reasonable. But the point is you don't seal first and then somebody justifies it later. We're not doing that. We're not doing that.

MR. BOIES: I appreciate that.

THE COURT: And there's got to be -- this forces a

discussion before it comes in and where is this going to come up? What are you going to be needing to file with the Court? I hope we're not all anticipating, well, our weekly discovery fight, Judge, what do you think? How else are we going to have weekly discovery fights if we don't want to submit highly confidential documents here? Or, you know, the 5,000 documents that will support our summary judgment motion. That's ridiculous. If you need 5,000 documents to support or oppose summary judgment, you're in trouble in the first place, whichever side that may be. You know?

This may be an enormous case, but, people wiser than I am have often said that the most complex boil down to about ten documents, you know. There may be terabytes produced, and I've certainly had trials where the trial evidence has been two terabytes of not videos or audios but of physical documents, and we've managed it, but we are not going to have unnecessary filings. When you have a real discovery dispute, if you have one, I'm happy to be all ears; but if we're just going to play games and, you know, grown ups can't resolve it, it's going to get unpleasant quickly.

MR. ZWEIG: The Court's guidance is helpful, your Honor. We'll discuss the time period and other issues with the other side.

THE COURT: Yes. I'm going to just say it right now. If testimony is important enough to be heard by a trier of fact

or to be considered on summary judgment, then the likelihood is that it doesn't belong being under seal. I went through this with the, I don't know if it was the third amended complaint, second amended complaint, or maybe a little bit with both of them. Yeah, sure, let's protect individuals' privacy so that they don't get flooded with emails late at night from people with time on their hands who are reading dockets, but short of that, there's not a heck of a lot that belongs in a complaint that needs to be a state secret.

What else?

MR. BOIES: Your Honor I don't want to go backwards, but --

THE COURT: No, go ahead.

MR. BOIES: There was an issue on page 11 that I don't think we addressed.

THE COURT: Okay.

MR. BOIES: That's at the top where Google is requesting a provision that essentially says that, "any portion of a transcript or deposition exhibit is confidential without having to make any designations."

THE COURT: And why would that be? That's a question for Google.

MR. MAHR: Well, your Honor, we don't think the burden of making confidentiality designations of a deposition is worth the candle. Highly confidential information in this case is a

strict standard. It has to be material and significant to competitive commercial harm. On the other end, if anything is going to be publicly used, we go to *Lugosch*, which is a different standard.

In the middle -- and part of this might be remedied by a tightened version of confidential information, but we believe that a case in which we have to go through every deposition and determine on the broad standard that previously existed that we are going to fix to figure out what may or may not be confidential, it doesn't serve a purpose because there's not going to be any use -- it doesn't affect the use of the information in the case, and the information is not going to be used outside the case unless it passes *Lugosch*.

THE COURT: Well, I don't know that -- if I understood you correctly, I don't know that I'm agreeing with that. So this is a deposition, and the deposition is not being designated as highly confidential. Is that the circumstance we're dealing with here?

MR. MAHR: After the deposition is over, Google has a certain amount of time to designate portions that are highly confidential.

THE COURT: Right.

MR. MAHR: Because that will affect the use of the deposition in other parts of the case. Whether things are identified as confidential information or not doesn't have a

lot of ramifications for the litigation, the rest of the litigation. That's why Judge Jordan viewed it as: Just leave it all confidential; we're not going to be putting these depositions out into the public anyway, and the only examples of possible -- of information that the plaintiffs provided was the background, for example, of the deponent. That's not information that should be going out into the public anyway. So we don't see a purpose in requiring Google -- and it's a one-way requirement -- to go through all these depositions and identify confidential material when there's no purpose for that identification.

THE COURT: Well, but, see, this goes back to when we first started at the beginning of the afternoon, the definition of confidential was so loosie that it's like, well, if it's -- I hope you're not saying if it's not public and we have not made it public, then it's per se confidential.

MR. BOIES: That's what he's saying, your Honor.

MR. MAHR: That's not what I'm saying.

THE COURT: Listen, I know sometimes taking it to the absurd isn't always fair to people, but I assume the cafeteria menu is not public either, but it's not confidential. That's not the standard. Certainly, if it is public, then it can't be confidential, but it seems to me that this should not be reflexive.

MR. MAHR: Your Honor, our point is what's the

difference for the litigation to our designating something confidential or not unless the idea is that the plaintiffs want to publicize something about a deposition. There's no First Amendment right to take discovery materials and try the case in the public. So we don't see any practical value of imposing an extra set of work on Google, mainly Google, because we're the ones that have the information, without any kind of rhyme or reason.

MS. VASH: Your Honor?

MR. BOIES: Your Honor, David Boies.

THE COURT: And then Ms. Vash.

MR. BOIES: I'm sorry.

THE COURT: Go ahead.

MR. BOIES: We've just gone through the sealing issue. If something is confidential, we can't use it in our papers unless we go through -- whether it's three days, five days, 14 days -- this process of presenting it to them, them responding and then bringing it to the Court if they object.

THE COURT: Well, just let me challenge that or ask that, I -- Mr. Boies, I assume you've read this more carefully than I have. I thought that only applied to highly confidential.

MR. BOIES: No, if you look at page 30, 24(a).

THE COURT: 24(a).

MR. BOIES: At the top of the page, it says,

"Notwithstanding the Court's individual practices, unless otherwise ordered, a party's filing containing or" --

THE COURT: Yeah. No, I get it. I get it. I stand corrected. That's a real problem. Yeah. Nope. If you want that provision in, you want any variation on that theme, yeah, you're going to have to designate it, and there's going to be -- you're going to have an uphill battle under *Lugosch*. It's not going to be enough to simply say, oh, well, this is conclusory fashion; this is valuable, important to our business and could provide a competitive advantage to somebody. Just those conclusory terms are not going to carry the day. And so if that's going to trigger the obligations and the mechanism for sealing applications, then let me impose the requirement on you to designate exactly the page and line that you think is confidential and be prepared to justify it.

Ms. Vash.

MR. VASH: Thank you, your Honor.

Just as your Honor just said, don't justify it after the fact, let's justify it before the fact. Rule 26 requires just that. Rule 26(c) says that the Court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following, requiring that a deposition be sealed and opened only to the Court order.

Google is required under Rule 26(c) to make that

showing before the Court before they get a blanket designation of confidentiality. That's in the rule, and that's what the case law says, and so that's why we believe that they do need to make that showing.

THE COURT: Well, I'm open to allowing Google to designate something as confidential. They will have to designate it and the fight will come when somebody wants to file it, but I am hoping that this will be at the summary judgment stage, if there is one, and, I don't know, maybe it could come up with in limine motions, I don't know, but I don't expect it to be an everyday thing. And even in in limine motions, you can make an in limine motion that all evidence of what we're doing in the following four continents should be excluded from trial evidence. You don't need to annex a lot of documents on that. You can say there are documents that deal with what we're doing in Antarctica, and that has nothing to do with this case and your Honor should not allow that kind of evidence in. Nobody really needs confidential information for that.

MR. ELIAS: Jordan Elias for the advertisers. If I may be heard briefly on this?

THE COURT: Sure.

MR. ELIAS: I think this issue might also arise in connection with class certification proceedings where we typically file a few dozen exhibits in support of our requests.

I guess my concern has to do with the burden on the Court under this protocol.

If we must disclose the exhibits that have been designated as confidential or highly confidential by Google 14 days in advance, they must make their particularized showing within a week before our filing date, it seems to me that that places a burden on the Court to rule almost instantaneously on these potential sets of --

THE COURT: I have a way around that. You can file your papers in unredacted -- not file it. You can deliver it to chambers and I'll have it, okay? And I don't have to resolve it instantaneously; you won't be in default on your filing. You can deliver it to chambers in whatever form while the sealing motion is on, and that's not going to slow me down. I'll have the motion papers.

MR. ELIAS: I see. Thank you.

THE COURT: We may have some bellwether rulings on confidentiality and highly confidential early on in this case that may make things easier. That may be the answer.

What else? When do you want to get me a revised draft?

Yes?

MR. ORSINI: Your Honor, Kevin Orsini for Meta.

THE COURT: Yes.

MR. ORSINI: I'm glad Mr. Boies went back to page 11

because I didn't want to be the one to have to go backwards. One other issue is on page 22, your Honor, which I think can be addressed quickly. This is the question of which employees of Meta or Google can be shown documents at depositions produced by the particular company. Obviously, these are very, very large institutions with many employees. It is exceedingly common in such entities not to share all of the most highly confidential information with every single one of those employees. Our position is simply that just because you're deposing a Meta employee doesn't mean that you can show them any Meta document, including our most highly confidential documents, such as a memo draft by Mr. Zuckerberg. We've left open -- and, of course, with executive officers, you can show them whatever you want. A 30(b)(6) witness, you can show them whatever you want. But any Meta witness or any Google witness should not be able to be shown each and every Meta document or Google document, as it may be, regardless of whether it's something that has anything to do with their day job.

THE COURT: Well, what do you do when a senior official says: This is our policy. This is how we ought to be doing this. This is what people should be doing. And now you're going below the upper level, maybe deep in the organization. What's the problem with asking that person whether this is in fact the practice that was followed?

MR. ORSINI: So if it's a policies, those are policies

that would be available to all employees. What I'm focused on are -- let's say Mr. Zuckerberg is debating with Ms. Sandberg some highly confidential business plan, and they want to show it to some very low-level Meta employee to discuss that highly confidential business plan with them at a deposition.

THE COURT: Well, if that happens, that's insanity, and I suspect you're going to be on the phone to me. Never mind the document, the questioning is insane.

MR. ORSINI: Well, I agree with that, your Honor, which is why we're looking to this provision to minimize getting you on the phone because I'm not one to instruct, for obvious reasons, on relevance, a witness not to answer a question. What we're trying to have is some ground rules that provide guardrails here, and it's something that, frankly, I'm more concerned about, because they won't agree to it, than I might otherwise be.

THE COURT: Well, I think both of you are wisely -- and members of the bar are great at this, and I understand, judges do it too: The *what ifs*. They have their *what ifs*; you have your *what ifs*. Your *what if* is a good *what if*. Do you want to give me a *what if* on the other side?

MR. ZWEIG: I'd love to, your Honor. In fact, I created one using St. John's basketball players.

THE COURT: All right.

MR. ZWEIG: But, no, in all seriousness, your Honor,

an example in terms of why we need these provisions. If you have Google employee A communicating in an email with Google employee B, or a Meta employee, substitute whichever one you want, saying, hey, we've developed this great algorithm to really screw over the publishers, but we need to talk to our supervisor C, who is not an executive but just a Google employee; and the email chain then picks up and says, a Google employee says, hey, I spoke to C. He says it's a go, she says it's a go, and let's implement it. If we wanted to take that email chain and show it to Google employee C, the protective order wouldn't currently allow for that unless we had the provisions that we had asked for.

THE COURT: Well, you know, you're going to have to be very selective in who your ten deponents are. It's ten depositions a side under the federal rules. So I can referee ten depositions.

MR. ZWEIG: Your Honor is absolutely right. We do have to be selective, which is why we'd like to have the flexibility to figure out and be able to take the depositions that we want to take. In the scenario I just laid out, it may be that we want to do C, and not A and B, so -- since that was the person that made the decision.

THE COURT: Yeah.

MR. ORSINI: One point, your Honor, just for the record.

THE COURT: Yes.

MR. ORSINI: In fact, he would be permitted to do what he just described under the protective order.

THE COURT: I thought so. It sounded that way to me.

MR. ORSINI: It's paragraph (h) on page 22. "Any person who the highly confidential information itself indicates, or who the receiving party has a good-faith basis to believe, had access to the document or highly confidential information," right? An email saying he talked to employee C and he's on board, that fits.

MR. ZWEIG: May I make one other point.

THE COURT: Yeah.

MR. ZWEIG: Your Honor, there are sort of three provisions here. Being able to show documents to current employees. That's a provision that Google agreed to in the search case, the *U.S. v. Google* search case. They actually asked for and had to go back to the court and say, Judge, sometimes it's not clear which employee had access or knowledge, so we just think it's better to minimize disputes before the Court to just allow a depos -- you know, the person deposing the producing party to show documents on that producing party to any current employee. It minimized disputes. Google actually went and asked for that. That's one of the provisions that we're asking for.

THE COURT: I'm inclined to go with the plaintiff on

this. Listen, it's foreseeable that there are going to be instances where you're going to wistfully say, "Judge, I told you this was going to come up, and it's come up and this is a problem." And I may agree with you and may say, "Okay, we're going to shut this down." But my goal here is to get this simplified and get it done. So what do you need? You all are going to have to figure out how you want to handle this. But is it unreasonable to ask you to get this back to me after you've negotiated, and the drafts have been exchanged, and you've fought with each other, and you've emailed and counter-emailed and what have you, that I get something in 21 days. Is that reasonable?

MR. BOIES: That's entirely reasonable, your Honor.

THE COURT: All right. So somebody is going to have to figure out who is going to do what first, and I think that burden sounds to me like it's going to logically fall on Google because Google's interest transcend the different groups of plaintiffs. And perhaps you can circulate it to Meta's counsel and then get it out to the plaintiffs to comment on. You know, again, I said the perfect is the enemy of the good, and so let's get something and have that accomplished.

Anything else from the plaintiffs?

MR. ZWEIG: Your Honor, two quick items, and I apologize, I didn't get to this in the beginning.

As we indicated in our letter last week, our lead

counsel Mark Lanier and Ashley Keller couldn't make it and apologize for that, but you got the guy with the better haircut.

The other thing we raised with the Court previously, although not by application, is we proposed a few dates for hearings on motions to dismiss, and I know Google has requested a hearing on their motion to dismiss as well. We proposed May 24, 25th or 26th.

THE COURT: I'll reach out to you guys when I want you to come in.

MR. ZWEIG: Understood, your Honor.

MR. BOIES: Thank you, your Honor.

MR. ELIAS: Your Honor, one final point. Jordan Elias.

THE COURT: By the way, I think there's a rule in New York, you have to do it after the summer associates arrive. Anyway, but go ahead.

MR. ELIAS: With respect to the issue of ten depositions a side, the advertisers recognize that's in the federal rules. We favor efficient proceedings. However, this is something that parties in complex litigation regularly stipulate around it.

THE COURT: Well, guess what? Guess what? I was pulling your leg. I will tell you that. Maybe I shouldn't have told you that, but, but, parties are not going to

stipulate around it. No blank checks. You're going to have to persuade me why you need who you need when you're going above the limits. That's the what it's going to be. I've been in these cases and counsel will say, oh, 25 a side. Well, where does that come from? How do you know you need 25? You're just throwing out a number. No, we're not going to do that. You're going to justify -- you're going to get what you need and not anything more than you need.

MR. ELIAS: Very good. I did have a number in mind, but I do --

THE COURT: Well, I don't want to hear the number. That's not going to work, so -- and, you know, surprise reveal, these are going to be -- a witness is going to sit for their deposition once in the various cases. And so if it's a Google witness, the plaintiffs bar is going to have to figure out how they're going to divide this up, and you can use all your great negotiating skills and oral advocacy on your fellow plaintiffs' lawyers to figure out how that will be sorted out because the last thing you want is the judge telling you how it's going to be sorted out. That's never a good plan. But I appreciate your raising that point.

MR. ELIAS: Thank you, your Honor.

THE COURT: What else?

MR. MAHR: Nothing from Google.

MR. ZWEIG: Nothing from us, your Honor.

THE COURT: Thanks for coming in. I certainly understand, I wanted to get this done, get the ball rolling on this.

MR. ZWEIG: We appreciate the Court's expediency. Thank you.

THE COURT: All right. Thanks.

(Adjourned)